United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 8, 2010

TO : Daniel L. Hubbel, Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: National Enzyme Company
Case 17-CA-24883

512-5012-0133-1100
512-5012-0133-2250
512-5012-3322
512-5012-8320-5033

This case was submitted for advice to determine whether the Employer violated Section 8(a)(1) when it blocked employees from receiving the Charging Party's Union-related emails at their work email accounts. We conclude that the Employer's restrictions against employee receipt of the Charging Party's Union-related emails were not unlawful because the evidence does not establish that the Employer engaged in discrimination along Section 7 lines. [1]

FACTS

On May 31, 2010,[2] Charging Party James Vanderploeg, an employee of Respondent National Enzyme Company (NEC), sent an email from a personal email account to the work email addresses for 45 employees, including some managers and supervisors. In the email, entitled "Lets Get Together," Vanderploeg raised employee concerns about wages, benefits and job security and asked recipients to read the attached .pdf document, a "Fact Book" issued by the International Brotherhood of Electrical Workers (the Union). Vanderploeg also provided contact information for the Union's Lead Organizer, whom employees could call with questions. Shortly after sending the email, the Employer blocked Vanderploeg from sending further emails to employees from his personal account. Although he was not specifically warned or disciplined for his conduct, on June 10 Vanderploeg was terminated.[3]

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[1] The Guard Publishing Company d/b/a The Register-Guard, 351 NLRB 1110 (2007).

[2] All dates are in 2010 unless specified otherwise.

[3] The Region intends to issue complaint, absent settlement, to allege that the termination was in response to the

On June 20, after his termination, Vanderploeg sent a second union-related email from a different personal email account to employees at their Company email addresses. In the email, Vanderploeg responded to an Employer-issued memorandum to employees that conveyed its opposition to the Union and he again included the Union organizer's contact information should employees want further information. As previously, the Employer subsequently blocked employee email accounts from receiving messages from Vanderploeg's email account.

The Employer maintains a policy entitled "Use of Electronic Mail/Systems & Voice Mail" which provides, in pertinent part, that "users may not use email, voice mail, Internet, or online services for … soliciting for non-Company outside organizations or commercial ventures." Between 2002 and 2006, the Employer warned Vanderploeg on three occasions that non-work related emails he had sent to fellow employees were violations of the Employer's email policies.[4] They included a March 5, 2002, warning regarding the distribution of a petition to honor firefighters after 9-11; 2) an April 5, 2002, warning for sending an email soliciting interest in a Company "Relay for Life" team, as well as monetary donations; and 3) a September 16, 2006, warning for sending an email forwarding a survey benefiting Mary Kay Cosmetics.

ACTION

We conclude that the Employer's restrictions against employee receipt of the Charging Party's Union-related emails were not unlawful under The Register-Guard, because the evidence does not establish that the Employer engaged in discrimination along Section 7 lines.

After concluding that employees had no Section 7 right to use their employer's email system, the Board in The Register-Guard,[5] considered whether the employer violated the Act by enforcing its communications policy in a

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Charging Party's protected concerted activity in support of the Union.

[4] At this time, Vanderploeg was not in a unit position, but rather was a manager in the Employer's information services department.

[5] The Guard Publishing Company d/b/a The Register-Guard, 351 NLRB 1110, 1116-17 (2007).

discriminatory manner. In doing so, it modified Board law concerning discriminatory enforcement, concluding that, to be unlawful, an employer must discriminate along Section 7 lines by treating activities of "a similar character" disparately because of their union or other Section 7 status.[6] The Board thus adopted the Seventh Circuit's analysis in Fleming Co.[7] and Guardian Industries,[8] where the court found lawful policies that distinguished between "personal," non-work-related postings on a bulletin board, such as for-sale notices and wedding announcements, and "group" or "organizational" postings, such as union materials.[9] Under this view of discriminatory enforcement, an employer does not violate the Act if it distinguishes between charitable and noncharitable solicitations, personal and commercial solicitations, personal and organizational invitations, and solicitation and "mere talk." In each case, the Board noted, the fact that union solicitation may be prohibited did not establish that the rule discriminated along Section 7 lines.[10] The Board, however, noted, "if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful."[11]

Here, evidence establishes that the Employer did not discriminate against its employees along Section 7 lines. The Employer has consistently prohibited employees from utilizing its email system as a means to solicit interest in both charitable and noncharitable, commercial entities. The Employer's prior 2002 and 2006 warnings to Vanderploeg about sending non-work related emails pertaining to charities and Mary Kay Cosmetics establishes that it did not discriminate against the Charging Party along Section 7 lines by blocking Union-related emails in 2010. Thus, the evidence does not establish that the Employer treated activities of "a similar character" disparately because of

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[6] Id. at 1117-18.

[7] 349 F.3d 2968 (7th Cir. 2003), denying enf. 336 NLRB 192 (2001).

[8] 49 F.3d 317 (7th Cir. 1995), denying enf. 313 NLRB 1275 (1994).

[9] 351 NLRB at 1117-18.

[10] Id. at 1118.

[11] Id. at 1118 n.18.

their union or other Section 7 status. Rather, its treatment of activities of "a similar character" was consistent both before and after the advent of Union activity.

Accordingly, the Region should dismiss this Section 8(a)(1) allegation, absent withdrawal.

B.J.K.